

BRIDGING THE DIVIDE? THEORIES FOR INTEGRATING COMPETITION LAW AND CONSUMER PROTECTION

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Commissioner Kovacic of the US Federal Trade Commission has stated that “consumer protection laws are important complements to competition policy”.¹ According to the UK Office of Fair Trading, “[c]ompetition and consumer policy are interdependent”; together they “provide a framework for markets to deliver maximum benefits for consumer welfare and productivity growth”.² Competition Commissioner Aitken of the Canadian Competition Bureau noted, “I do really think the two mandates address two sides of the same coin with the ultimate goal of economic and consumer welfare”.³ At the Fourth Antitrust Marathon, hosted by the Irish Competition Authority and executed by Professor Spencer Waller and Dr Philip Marsden, the lead-off topic was the integration of competition law and consumer protection. This paper theorises that topic.

A. INTRODUCTION

Competition law is traditionally conceived as regulation of the marketplace to ensure private conduct does not suppress free trade and competition. It has as its goal the preservation of competition. Competition serves to optimise consumers’ interests. Consumer protection regulation denotes a body of law designed to protect a consumer’s interests at the level of the individual transaction. The two fields share the same ultimate goal of protecting consumers.

But their approaches to achieving that goal differ. It may be possible to conceive as the overriding distinction as one of market definition: consumer protection regulation defines the market to be very small, limited to the parameters of the individual transaction. That difference in approaches suggests

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¹ WE Kovacic, *Competition Policy, Consumer Protection, and Economic Disadvantage* (2007) 25 *Journal of Law & Policy* 101, 114.

² UK Office of Fair Trading, “Joining Up Competition and Consumer Policy: The OFT’s Approach to Building an Integrated Agency”, OFT1151 (2009), para 1.2.

³ M Aitken, comments at the Fourth Antitrust Marathon (27 October 2009), *infra* p 30.

it is possible that integration of a scheme designed to regulate markets nation- or worldwide with a scheme designed to regulate atomistic transactions, which consumer protection does, is neither realistic nor desirable. Likewise, protecting consumers in individual transactions with a scheme designed to ensure competition is preserved may miss the mark. This paper explores those possibilities as well.

The integration of competition law and consumer protection has both substantive and systemic components.⁴ The substantive question is whether pursuing the end of consumer welfare optimisation through market regulation is consistent with pursuing the same end through regulating transactions. The systemic question is whether an agency or remedial scheme constituted to advance competition policy can also serve the purpose of protecting individual consumers or an agency or remedial scheme constituted to protect individual consumers is consistent with the larger goal of preserving competition.

In Section B, I discuss the meaning of consumer harm. The prevention of consumer harm is a goal of both competition law and consumer protection. What consumer harm means is remarkably under-theorised. In Section C, I address the following doctrinal and theoretical innovations and their place in the two fields. First is the common use of deception rationales in consumer protection and competition law enforcement. Second is the application of behavioural economics in both consumer protection and competition law enforcement. Third is market manipulation as a specific example of a hybrid competition/consumer protection theory. Fourth and last is monopoly exploitation as a specific example of a hybrid competition/consumer protection theory. I then turn in Section D to the topic of enforcement systems. I inquire whether an agency created for competition law enforcement is appropriately situated to engage in consumer protection work. I also propose the possibility that private actions are better used in consumer protection than in competition law.

B. THE ELUSIVE CONCEPT OF “CONSUMER HARM”

There is seemingly universal worldwide agreement that competition law and consumer protection law both exist to protect consumers.⁵ What is the harm to

⁴ See WE Kovacic, “The Federal Trade Commission at 100: Into our 2nd Century” (Federal Trade Commission, 2009), 8 (“successful public policy outcomes are the product of good physics and good engineering”, defining “physics” of competition and consumer protection to be doctrinal and policy questions, and “engineering” to be institutional questions), available at www.ftc.gov/ftc/workshops/ftc100/docs/ftc100rpt.pdf (accessed on 2 February 2010).

⁵ Even the most efficiency-minded of US antitrust scholars adopt this view. See RA Bork, *The Antitrust Paradox* 51 (New York, Free Press, 2nd edn, 1993) (“consumer welfare” is “the sole value” underlying antitrust). It has worldwide acceptance as well. See OECD, “Report on the Seventh Global Forum on Competition” (2008), 8 (concluding that competition law exists to protect consumers).

be prevented or remedied remains poorly understood.⁶ Consumer harm in competition law may differ from consumer harm in the field of consumer protection.⁷ It is also necessary to ask what is meant by “consumer”, and whether it is the same thing between competition and consumer protection law.

1. Consumer Protection

In the consumer protection field, harm is comparatively easy to define. It is a break-down in an individual consumer transaction. The failure usually occurs at the origination stage. But as, for example, in the cases of laws regulating usury or common-law doctrines such as unconscionability, consumer harm can occur in the substance of the transaction. The failures with which consumer law is concerned undermine the consumer’s ability to optimise his or her own welfare. Consumer law targets those failings to grant individual consumers remedies. It thus fills gaps that market forces leave unfilled.

In the US system, at least, the “consumer” in consumer protection law usually is easy to define: it is the individual, end-user consumer.⁸ Many US federal consumer protection statutes limit their application to transactions involving individuals where the subject of the transaction is primarily for personal, family, or household purposes.⁹ That meaning may be universal: the OFT describes “[c]onsumer policy . . . as focusing on how firms interact with [individual retail] consumers, on trading practices and contract terms”.¹⁰

The Federal Trade Commission Act is not so limited. It applies to unfair or deceptive trade practices generally without regard to the victim of those practices.¹¹ But theories of deception and unfairness often turn on disparities in sophistication between the parties, suggesting the individual consumer is the better victim.¹²

⁶ See A Devlin, “Antitrust in an Era of Market Failure” [2010] *Harvard Journal of Law & Policy* (forthcoming), draft, 21, available at <http://www.ssrn.com/abstract=1429539> (accessed on 2 February 2010) (“‘Consumer welfare’ is itself a nebulous concept, subject to multiple interpretations”), citing GJ Werden, “Essays on Consumer Welfare and Competition Policy” (2009), available at <http://www.ssrn.com/abstract=1352032> (accessed on 2 February 2010).

⁷ See OFT, *supra* n 2, paras 2.3–2.4 (contrasting the aims of competition law and consumer protection).

⁸ But see *In re Intel Corp*, FTC Dkt No 9341, Compl paras 4, 10, 103 (filed 16 December 2009) (alleging “deceptive acts or practices” with victims of those practices presumably being Intel’s computer manufacturer customers).

⁹ See, eg 15 USC § 1602(h) (defining “consumer” for purposes of the Truth in Lending Act); §§ 1635, 1637, 1637A, 1638 (substantive sections of TILA limited to consumer transactions).

¹⁰ OFT, *supra* n 2, para 2.4; see also *ibid*, para 2.3 (defining “consumer” as “individual retail consumer”).

¹¹ See 15 USC § 45.

¹² See, eg *Charles of the Ritz Distrib Corp v FTC*, 143 F2d 676 (2d Cir 1944) (FTC Act “not made for the protection of experts, but for the public”, including “the average woman, conditioned by talk in magazines and over the radio”). It is also the case that consumer protection is a populist

2. Competition Law

Defining consumer harm is much more difficult in competition law. The consumer harm in US competition law generally is phrased in terms of decreased output and increased prices.¹³ The dictum that competition law should be primarily concerned with consumer welfare is more fully understood to mean competition law seeks to prevent harm to competition, and consumer welfare will be thereby maximised.¹⁴

Such an approach has the tendency to undermine any direct intervention on behalf of individual consumers. If an individual transaction produces a sub-optimal result, competition law assumes the marketplace will supply the resolution.¹⁵ The incapable or shady merchant will be replaced by one who serves consumers' wishes and does so fairly. Across the mass of consumers, then, welfare may be optimised. The handful of consumers left unsatisfied before the losing producer exited the market are too few to bring down the average. Those few do not reflect "harm to competition".¹⁶

The definition of "consumer antitrust" remains under-theorised.¹⁷ That is a remarkable reality, given the frequency with which consumer welfare is invoked to justify a particular decision or policy prescription.¹⁸ There remains a vigorous debate whether consumers benefit when economic efficiency is maximised, and

endeavour, and protecting individual end-users makes for a better press release than does protecting a commercial enterprise.

¹³ Mr Averitt and Professor Lande prefer a standard based on "consumer choice", both in terms of price and non-price characteristics. NW Averitt and R Lande, "Using the Consumer Choice Approach to Antitrust Law" (2005) 74 *Antitrust Law Journal* 175, 179.

¹⁴ See *Fishman v Estate of Wirtz*, 807 F2d 520, 536 (7th Cir 1986) ("The antitrust laws are concerned with the competitive process . . . A healthy and unimpaired competitive process is presumed to be in the consumer interest"); FH Easterbrook, "When is it Worthwhile to use Courts to Search for Exclusionary Conduct?" [2003] *Columbia Business Law Review* 345, 347; G Monti, remarks at the Fourth Antitrust Marathon (27 October 2009), Tr 33–34 (noting that competition law protects competition, not consumers as such, and citing the Whole Foods merger for the proposition that an emphasis on consumer protection risks over-enforcement).

¹⁵ OFT, *supra* n 2, para 2.3.

¹⁶ Professor Crane differentiates between wealth transfers from individual consumers to producers, which is "not necessarily inefficient in an economic sense", and "deadweight losses", which are "the primary social costs of anticompetitive behavior". DA Crane, "Optimizing Private Antitrust Enforcement" [2010] *Vanderbilt Law Review* (forthcoming), draft, 7, available at ssrn.com/abstract=1474956.

¹⁷ That is so not just in the US. See P Marsden and P Whelan, "Consumer Detriment and its Application in EC and UK Competition Law" (2006) 10 *European Competition Law Review* 569, 572 ("given that one of the fundamental objectives of EC competition law relates to the maximization of consumer welfare", it is "undeniably odd that neither consumer benefit nor consumer detriment have been given comprehensive treatment").

¹⁸ Thoughtful recent work of Professor Lande, Professor Kirkwood and Neil Averitt makes efforts to remedy this limitation. See JB Kirkwood and R Lande, "The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency" (2008) 84 *Notre Dame Law Review* 181; NW Averitt and R Lande, "Using the Consumer Choice Approach to Antitrust Law" (2005) 74 *Antitrust Law Journal* 175.

who gets the surplus is unimportant, or competition law requires that consumers rather than producers benefit from surplus welfare.¹⁹

Averitt and Lande's "consumer choice" paradigm harmonises competition law and consumer protection. Competition law, by protecting competition, ensures consumers have options available to them. Consumer protection ensures that "consumers are able to make a reasonably free and rational selection from among those options".²⁰ That elegant resolution suggests that antitrust and consumer protection are complementary so long as consumer protection targets the origination phase of the consumer transaction, dealing with theories of deception and their close cousin, disclosure regulation. Averitt and Lande's paradigm does not hold where consumer protection regulation targets substantive transaction terms, because those terms limit, rather than enhance, consumer choice.

C. DOCTRINAL AND THEORETICAL INNOVATIONS

In this section I discuss four legal innovations and their place in antitrust and consumer protection, respectively. First is the common use of deception rationales in consumer protection and competition law enforcement. Second is the application of behavioural economics in both consumer protection and competition law enforcement. Third is market manipulation as a specific example of a hybrid competition/consumer protection theory. Fourth and last is monopoly exploitation as a specific example of a hybrid competition/consumer protection theory.

1. Deception

Deception is the quintessential consumer harm.²¹ Deception operates at the origination phase of a consumer transaction. It limits consumers' abilities fully and fairly to negotiate the terms of the transaction and causes them to enter into transactions they would otherwise eschew. Deception thus strikes at the

¹⁹ The "surplus" is the area on the supply-demand graph that reflects amounts consumers are willing to pay in excess of the producer's costs of production. See KN Hylton, *Antitrust Law: Economic Theory and Common Law Evolution* (Cambridge University Press, 2003), 3–4 (noting that "total surplus" is the aggregate of the differences between what consumers are willing to pay and producers are willing to accept for each unit of output). Much business conduct can be explained by producers' efforts to co-opt for themselves as much of the surplus as possible.

²⁰ Averitt and Lande, *supra* n 18, 181. Cf OFT, *supra* n 2, para 3.3 (OFT's interventions "safeguard the choices available to customers". Consumer protection "promot[es] 'clean' conditions in which customers can exercise choice . . .").

²¹ Cf MM Greenfield, *Consumer Transactions* (Gaithersburg, MD, Aspen, 5th edn, 2009) (describing early consumer law as a reaction to failings in a system based on freedom of contract and caveat emptor).

foundation of the freedom of contract and welfare optimisation through free choice. Harm exists even where the transaction is otherwise “fair” to the consumer.

According to Professor Stucke, circumstances may exist in which deception also is competitive harm.²² He argues that profit-maximising firms would only engage in deception if the expected benefits, in the form of monopoly profits, outweighed the expected costs, which include the costs of the deceitful advertising, the criminal and civil liability that may attend, and the “potential loss of sales, goodwill, and competitive advantage if the deceit is uncovered”.²³ He proposes that a *prima facie* case of a violation of section 2 of the Sherman Act should be established by proof that a monopolist engaged in deceitful conduct which is reasonably capable of creating or maintaining monopoly power.²⁴

It is not difficult to see how, in theory, deception can harm the marketplace as well as the individual consumer. Market forces operate on the basis of consumers’ revealed preferences. Where consumer decisions are made on the basis of material misinformation, consumer contracting decisions do not reveal consumer preferences in any real sense. The very harm that gives rise to liability under consumer protection theories also presents a possible competitive concern.

Moreover, economists have proved that deception will exist in some optimal amount whenever one of two conditions holds. Either there must be a strong belief that the deception will not be exposed, or the firm must not be concerned about repeat business.²⁵ A monopoly or near-monopoly marketplace satisfies both conditions. Consumers have no alternatives, so must return to the monopoly producer if they want to make a purchase. And the chance of deception being exposed is minimised because there are no competitors available to do the exposing.²⁶ That suggests that monopoly maintenance through

²² See ME Stucke, “How Do (and Should) Competition Authorities Treat a Dominant Firm’s Deception?”, University of Tennessee College of Law Research Paper No 57 (2009), available at ssrn.com/abstract=1397728 (accessed on 2 February 2010).

²³ Stucke, *ibid.* 13. In support of Stucke’s arguments, the concerns of loss of sales, goodwill and competitive advantage seem small in comparison to the advantages to be gained from fraud and deceit. Importantly, the benefit from deceit is borne entirely by the single deceitful actor. The harm is spread across the entire industry. *Cf* Kovacic, *supra* n 1, 114–15 (“False advertising and deceptive marketing practices can damage the capacity of honest merchants to attract consumers . . .”).

²⁴ Stucke, *supra* n 22, 42.

²⁵ See MR Darby and E Karni, *Free Competition and the Optimal Amount of Fraud* (1973) 16 *Journal of Law & Economics* 67, 69–71, 74–75, 77; R Posner, *Regulation of Advertising by the FTC* (Washington, AEI 1973), 5.

²⁶ Stucke argues that deception cannot succeed in a perfectly competitive marketplace. Stucke, *supra* n 21, 2 (“Deception does not occur in a perfectly competitive market . . .”). Darby and Karni demonstrate otherwise. Producers in a perfectly competitive market are indifferent as to whether the consumer returns, satisfying one of the conditions for some amount of fraud being optimal. See Darby and Karni, *supra* n 25, 77 (“In the strictest competitive framework for the model, the present value of future relationship with the customer would be zero, since there is no reason for

deception is realistic and rational. It should therefore offer a basis for an abuse of dominance liability.

Deception might also present a theory of harm in oligopoly industries. Firms in an industry marked by few participants and with homogenous goods (or homogeneous characteristics of differentiated goods) might find it advantageous not to expose their competitors' deception, but instead to imitate it.²⁷ A ready example of this is the parallel failure of cigarette manufacturers to expose the harm caused by rivals' products.²⁸ Jurisdictions that pursue theories of harm through tacit collusion might consider tacitly collusive deception as a form of illegal coordinated conduct. Tacitly collusive deception is certainly not, or likely to become, a theory of harm in the US system.²⁹

Recent mainstream antitrust thinking in the United States has tended to assume deception cannot have real market effects.³⁰ It appears that the EC shares this general view in its enforcement of Article 82 of the EC Treaty. In the 2 September 2009 Guidance paper on enforcement priorities, deception by a dominant firm was not discussed as a specific form of abusive conduct.³¹ The Canadian Competition Bureau's draft updated enforcement guidelines for abuse of dominance, interpreting sections 78 and 79 of the Competition Act, likewise fail to mention deception as impermissible conduct.³² However, "misleading

the customer to return in the future in any case"). Cf. OFT, *supra* n 2, para 2.4 ("consumer policy issues may arise in industries that seem highly competitive, such as house repairs and airlines"); E Janger and S Block-Lieb, "Consumer Credit and Competition: The Puzzle of Competitive Credit Markets" (2010) 6 *European Competition Journal* 68 ("Price competition" in consumer credit markets "often takes the form of price concealment"). Of course, only the monopoly or near-monopoly market presents an abuse of dominance concern.

²⁷ Just as game theory predicts rival filling station operators on opposite street corners will find it advantageous to increase prices and not to decrease them. See M Huffman, "The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims" (2008) 10 *University of Pennsylvania Journal of Business and Employment Law* 627, 646.

²⁸ Janger and Block-Lieb give the example of two "lemons equilibria" in consumer lending, where, despite competition, lenders engage in "price concealment" and the enforcing of "default rates, late fees and penalties" that are "both non-transparent and designed to capitalize on consumer heuristic biases". Janger and Block-Lieb, *supra* n 26, 71.

²⁹ The US Supreme Court reaffirmed US courts' resolve to prohibit tacit collusion as an enforcement theory in *Bell Atlantic Corp v Twombly*, 550 US 544 (2007).

³⁰ See H Hovenkamp, *Antitrust Law* (New York, Aspen, 3rd edn, 2006), vol IIIB, para 782d (deceptive disparagement of a rival has a *de minimis* competitive impact).

³¹ EC, "Communication from the Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings" (2 September 2009), 13–26, available at www.hartpub.co.uk/updates/korah/abusiveexclusionaryconduct.pdf. However, the Guidance paper does not purport to address all the circumstances in which Art 82 may be applied. See *ibid*, 5 (noting that exploitation of monopoly power, "for example charging excessively high prices", may infringe Art 82, but is not discussed in the Guidance paper).

³² See Canadian Competition Bureau, "Draft for Public Consultation, Updated Enforcement Guidelines, The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)" (January 2009), i, available at <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf> (accessed on 2 February 2010).

advertising” is a violation of Canada’s Competition Act punishable by up to \$15 million fines, suggesting that deception theories have some validity in Canada.³³

2. Behavioural Exploitation

Behavioural economics has a natural place in consumer protection regulation. According to Professor Greenfield, “behavioral economics teaches that consumers are not necessarily rational actors and that sellers may structure transactions in such a way as to take advantage of this lack of rationality”.³⁴ There is a deep body of literature, in both the popular³⁵ and the academic³⁶ presses, expanding on that reality. According to Cavendish Elithorn, commenting on an earlier draft of this paper at the Fourth Antitrust Marathon, “[q]uite a lot of behavioural economics is . . . what marketers have known and used for years”.³⁷

The Bureau of Economics at the US Federal Trade Commission has recognised this reality. It held a conference on behavioural economics and consumer policy in 2007.³⁸ At that conference, papers demonstrating consumer decision-making biases and merchants’ abilities to exploit those biases were presented and critiqued.³⁹ The agency currently is undertaking “two exploratory studies on consumer susceptibility to fraudulent and deceptive marketing”.⁴⁰ The studies will concentrate on “several decision-making biases . . . that can cause inaccurate assessments of the risks, costs, and benefits of various choices”.⁴¹ As of now, however, how exactly to incorporate behaviouralist principles into a coherent enforcement regime remains under-studied.

³³ See Y Beriault, OJ Borgers, DB Houston, RT Hughes, M Renaud and RW Pawluk, “Government Enacts Significant Changes to Canada’s Competition Laws” (17 September 2009), available at <http://www.mondaq.com/article.asp?articleid=85924> (accessed on 2 February 2010).

³⁴ Greenfield, *supra* n 21, 1.

³⁵ See, eg RB Cialdini, *Influence: The Psychology of Persuasion* (New York, Harper Collins, revised edn, 2007).

³⁶ See, eg C Jolls, CR Sunstein and R Thaler, “A Behavioral Approach to Law and Economics” (1998) 50 *Stanford Law Review* 1471; M Stucke, “Behavioral Economists at the Gate: Antitrust in the Twenty-First Century” (2007) 38 *Loyola University Chicago Law Journal* 513, 527–32 (citing authorities).

³⁷ C Elithorn, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 29. See also Cialdini, *supra* n 35, xii (arguing that marketers, or “compliance professionals”, are adept at influencing consumer decisions using techniques that meet this author’s definition of behavioral exploitation).

³⁸ See <http://www.ftc.gov/be/consumerbehavior/index.shtml> (accessed on 2 February 2010).

³⁹ See, eg D Karlan in Session B: Information, Persuasion, and Deception: Marketing Techniques and their Impact on Consumer Choice, FTC Conference on Behavioral Economics and Consumer Policy (20 April 2007), 1–17, available at <http://www.ftc.gov/be/consumerbehavior/docs/transcript/transcriptb.pdf>. Professor Karlan presented a paper demonstrating that non-substantive marketing practices, such as the inclusion of a photograph of an attractive woman in an unsolicited offering of consumer loan products, had enormous impacts on the prices consumers were willing to pay for the products. See *ibid*, 13–14.

⁴⁰ Fed Reg, Vol 74, No 111, 27794 (11 June 2009).

⁴¹ *Ibid*, 27795; see also Fed Reg, Vol 74, No 111, 27796, 27797 (11 June 2009).

Although the Federal Trade Commission has begun to study the theories, it has not so far articulated an approach to consumer protection that protects consumers from their own irrational behaviour.⁴² Overtones of behaviouralist theories can be found in semi-subjective standards for deception, based on the “reasonable consumer” test (which implies a lack of sophistication)⁴³ or in especially protective legislation targeted at college students.⁴⁴ Disclosure requirements also may be predicated on concerns for exploitation. For example, regulations requiring that warnings be highlighted or be particularly vivid⁴⁵ might be linked to known tendencies to consumer optimism or seek themselves to exploit the so-called “vividness” bias. The Federal Trade Commission’s consumer education efforts may also be explained in part by a desire to overcome consumers’ decision-making biases in individual transactions.

By contrast, behaviouralist theories are slow to catch on in the analysis of competition law.⁴⁶ Neither of the US agencies has incorporated behaviouralism into their enforcement paradigms.⁴⁷ Professors Maurice Stucke and Avishalom Tor are two of the few to have analysed the role of behavioural economics in competition policy. According to Stucke, assumptions of rational conduct by

⁴² The FTC’s consumer education efforts serve this purpose in part. See <http://www.ftc.gov/bcp/consumer/shtm>.

⁴³ See, eg *Charles of the Ritz*, *supra* n 12; *In re Arthur Murray Studio of Washington, Inc.*, 78 FTC 401 (1971).

⁴⁴ See, eg the Credit CARD Act of 2009, Public L No 111–24, 123 Stat 1734.

⁴⁵ See, eg Cigarette Labeling and Advertising Act, 15 USC §§ 1331–41 (stating disclosure requirements for cigarette manufacturers).

⁴⁶ It may be possible to conceive of all conduct presenting competitive harms as deceptive or behaviourally exploitative in nature. The definition of most abusive dominant firm conduct assumes net consumer harm over the period of anticompetitive conduct and subsequent recoupment. Repeat player consumers acting rationally would not make purchasing decisions that would cause them greater expense over the long run. If consumers do act rationally, purchasing decisions that cause them net harm can be explained either by their being deceived or by information asymmetries that reflect omissions (deceptive under certain circumstances) by the producers. Consumers acting irrationally, based perhaps on optimism about future events or hyperbolic discounting of future costs, can be led into purchasing decisions that are more costly in the long term.

⁴⁷ In May 2009, in response to a question by this author, US Assistant Attorney General Christine Varney punted the question whether behaviouralism might play a role in a retooled enforcement methodology. See CA Varney, question-and-answer following “Vigorous Antitrust Enforcement in this Challenging Era”, remarks before the US Chamber of Commerce (12 May 2009), remarks available at <http://www.usdoj.gov/atr/public/speeches/245777.htm>. The following day Deputy Assistant Attorney General Carl Shapiro, the agency’s chief economist, affirmatively disavowed behavioural economics as an important investigation and enforcement tool. See C Shapiro, “Competition Policy in Distressed Industries”, remarks at the ABA Antitrust Symposium: Competition as Public Policy (13 May 2009), available at <http://www.usdoj.gov/atr/public/speeches/245857.htm> (accessed on 2 February 2010). FTC Commissioner J Thomas Rosch is more receptive to behaviouralist theories, as his remarks and one dissenting opinion suggest. See JT Rosch, “Antitrust Law Enforcement: What to do About the Current Economics Cacophony?”, remarks at the Bates White Antitrust Conference 2 (1 June 2009); cf *FTC v Ovation Pharm, Inc.*, FTC File No 810156 (Concurring Statement of Commissioner Rosch) (arguing that removal of reputational constraints that previously prevented the exercise of monopoly power might implicate Clayton Act, s 7).

firms do not hold across the range of behaviour by firms. “It appears anecdotally that corporate behavior is (or is not) occurring that is not readily explainable under antitrust’s rational choice theories.”⁴⁸ Stucke and Tor’s supply-side behavioural question has the potential to undermine decisions like that of the US Supreme Court in *Bell Atlantic Corp v Twombly*, which relied on assumptions of rational conduct by firms to conclude that failing to enter into competition after the deregulation of the US telephone markets was most likely based on unilateral decisions rather than conspiracy.⁴⁹

The demand-side question is a different matter. Behavioural economics teaches that consumers are not always rational. The Office of Fair Trading recently has recognised that remedies may be crafted with an eye toward realities of consumer behaviour imported from the study of consumer protection. For example, while consumer choice is believed to be good, behavioural economics teaches too much choice leads to sub-optimal results.⁵⁰

In “Money, is that What I Want?”, Stucke questions the assumptions of rational choice on the part of consumers.⁵¹ He stops short of prescribing a theory of competitive harm based on “behavioural exploitation”—which I define to be a merchant’s exploiting known biases in consumer decision-making. A theory of competitive harm through behavioural exploitation might approximate the theory of competitive harm through deception discussed in Section C.1 *supra*. By exploiting known biases in consumer decision-making, a monopolist can maintain, or perhaps even attain, monopoly power, just as it does through deceptive conduct. The same harm—causing inefficient resource allocation—that deception threatens arises in the context of behavioural exploitation as well. Consumers who are induced to make purchases on the basis of decision-making biases are not optimising their welfare.

In concrete terms, behavioural exploitation includes such behaviour as structuring default choices to induce consumers to make decisions favouring the

⁴⁸ Stucke, *supra* n 36, 517. See also A Tor, “A Behavioral Approach to Antitrust Law and Economics” (2004) 14 *Consumer Policy Review* 2.

⁴⁹ 550 US 544 (2007). *Cf* A Tor, “The Fable of Entry: Bounded Rationality, Market Discipline and Legal Policy” (2002) 101 *Michigan Law Review* 482 (concluding that behavioural economics teaches the traditional understanding of firms’ entry decisions is wrong).

⁵⁰ Office of Fair Trading, *supra* n 2, para 3.9. See also the remarks of Cavendish Elithorn at the Fourth Antitrust Marathon (27 October 2009), *infra* p 29 (“The OFT does believe behavioural economics is a really important lens through which to look at detriment and one which has an impact on elements like the choice question. We do believe in PQRS, price, quality, range and service as part of the overall welfare in our merger decisions and in our general approach. However we also note that in some cases excessive choice can lead to less consumer activation in the markets and that is a source of detriment”).

⁵¹ ME Stucke, “Money, Is that What I Want? Competition Policy and the Role of Behavioral Economics”, University of Tennessee Legal Studies Research Paper No 75 (forthcoming 2010; to be published in vol 50 of the *Santa Clara Law Review*), available at <http://ssrn.com/abstract=1419751> (accessed on 2 February 2010).

merchant, not the consumer.⁵² Other biases that can be exploited by savvy merchants include over-optimism;⁵³ the tendency to judge choices by their relative, rather than absolute, merit;⁵⁴ the tendency to believe exciting or fearsome (salient) phenomena, which are easy to call to mind, are more common than actually they are;⁵⁵ and the tendency to anchor decisions to arbitrary values.⁵⁶

A good recent example of behavioural exploitation in the US economy is the sale of lending products to consumers in the years leading up to the collapse of the housing bubble.⁵⁷ Consumers' agreeing to teaser-rate mortgages can be explained by decision-making biases such as irrational tendencies to over-optimism,⁵⁸ which would cause borrowers to believe they will be able to pay the mortgage or sell the house once the rate adjusts. In another paper discussed at the Fourth Antitrust Marathon, Professors Janger and Block-Lieb explain the phenomenon in terms of "cognitive limitations", "heuristic biases, such as optimism and endowment effects", and "time-inconsistent preferences, sometimes referred to as hyperbolic discounting".⁵⁹

How behavioural exploitation presents a competitive, rather than merely a consumer, harm is more difficult to explain. The behavioural exploitation theory of abuse of dominance suffers the same difficulties as does the deception theory. It is difficult to demonstrate the competitive harm, rather than harm to one consumer, flowing from a course of behavioural exploitation. But the same rationale supporting deception as a competitive harm should apply to behavioural exploitation, perhaps even with more force. The market impacts of falsely revealed preferences must produce allocative inefficiencies as resources flow to uses that reflect consumers' apparent, rather than actual, preferences. Unlike deception, behavioural exploitation is difficult to uncover, and therefore may produce longer-lasting consumer harm.⁶⁰

⁵² It is exceedingly difficult to draw the line between vigorous and desirable marketing practices and "behavioural exploitation".

⁵³ C Jolls, CR Sunstein and R Thaler, "A Behavioral Approach to Law and Economics" in CR Sunstein (ed), *Behavioral Law and Economics* (Cambridge University Press, 2000), 13, 47.

⁵⁴ See D Ariely, *Predictably Irrational* (New York, Harper Collins, 2008), 1–21 (citing, *inter alia*, A Tversky and D Kahneman, "The Framing of Decisions and the Psychology of Choice" (1981) 211(4481) *Science* 453).

⁵⁵ A Aviram, "The Placebo Effect of the Law" (2006) 75 *George Washington Law Review* 54, 73 (referring to salience as the "vividness bias").

⁵⁶ Ariely, *supra* n 54, 23–48 (citing, *inter alia*, CR Sunstein, D Kahneman, D Schkade and I Ritov, "Predictably Incoherent Judgments" (2002) 54 *Stanford Law Review* 1153).

⁵⁷ See Janger and Block-Lieb, *supra* n 26, 70.

⁵⁸ See Jolls *et al*, *supra* n 36.

⁵⁹ Janger and Block-Lieb, *supra* n 26.

⁶⁰ Economist Pat Massey noted another concern with a behavioural exploitation theory of enforcement. "Regulatory agencies have an inbuilt incentive to continuously expand their activities so if you start down the road of saying we have to protect consumers from themselves agencies will find great scope to dream up all sorts of imaginative ways of doing that and expanding their own empires." P Massey, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 45.

Thus, as with deception, two criteria for some amount of behavioural exploitation being rational are a lack of expectation of repeat player business and a low risk of detection.⁶¹ A monopoly marketplace satisfies both criteria, with no competitors to expose the behavioural exploitation and no other options available to consumers. Monopoly maintenance through behavioural exploitation seems likely to be successful. Acquiring a monopoly through behavioural exploitation is less likely to succeed.⁶² More so even than with deception, competitors are the most likely expositors of exploitation.⁶³ Also, if exploitation is exposed and counteracted, consumers have competitive options for their purchasing decisions.

3. Market Manipulation

One recent example of agency law-making in the US is worth studying as an example of combined competition law and consumer protection theories. On 4 November 2009, an FTC rule dealing with market manipulation in the petroleum industry became effective. Promulgated under the authority of the Energy Independence and Security Act of 2007,⁶⁴ the rule “prohibits fraudulent or deceptive conduct that could harm wholesale petroleum markets”.⁶⁵

Market manipulation as a theory of competitive harm is sufficiently unique in the US system that this approach required the first antitrust rulemaking in US history.⁶⁶ The description of the rule and its purposes reads much more like classic consumer protection doctrine. The FTC is concerned with “fraud”, “deceit” and “omissions of material information”.⁶⁷ But, unlike classic consumer protection doctrine, which Section B shows is concerned with individual end-user consumers, the market manipulation rule is concerned only with harms in the wholesale marketplace.⁶⁸ Concerns for harm at wholesale rather than

⁶¹ Cf Darby and Karni, *supra* n 25.

⁶² Monopoly acquisition has recently been argued to be an enforcement backwater both in the US, where it technically can be challenged, and in the EU, where “a nondominant firm may obtain dominance through unilateral anticompetitive conduct without risking violating European competition law”. A Tor, “Unilateral, Anticompetitive Acquisitions of Dominance or Monopoly Power” (2010), 2–3, available at ssrn.com/abstract=1531745.

⁶³ Competitors will be educated in the same marketing techniques and will be able to recognise exploitative conduct engaged in by their competition.

⁶⁴ 42 USC §§ 17301–17305.

⁶⁵ FTC press release, “New FTC Rule Prohibits Petroleum Market Manipulation”, 6 August 2009, available at <http://www.ftc.gov/opa/2009/08/mmr.shtm> (accessed on 2 February 2010). The rule is available at http://www.ftc.gov/os/2009/08/P082900mmr_finalrule.pdf (accessed on 2 February 2010).

⁶⁶ But see CS Hemphill, “An Aggregate Approach to Antitrust: Using New Data and Rulemaking to Preserve Drug Competition” (2009) 109 *Columbia Law Review* 629, 644, note 68.

⁶⁷ *Supra* n 65.

⁶⁸ See Guide to Complying with Petroleum Market Manipulation Regulations 1, available at <http://www.ftc.gov/ftc/oilgas/rules.htm> (“EISA and the Petroleum Market Manipulation Rule do not apply to retail sales of gasoline, diesel, or fuel oil”). The Compliance Guide also differentiates

retail are reminiscent of theories of competitive, not consumer, harm.⁶⁹ In fact, in antitrust suits by purchasers under the US antitrust laws, harm is only cognisable in the wholesale marketplace.⁷⁰

The theoretical allocative inefficiency from market manipulation is clear enough. A strategy of creating and maintaining dominance in the market might include falsely reporting prices in wholesale transactions. False price reports may impact new entrants' decisions whether to devote resources to entry.⁷¹ Such false reporting, if effective in excluding competitors, would present a clear competitive harm.

False reporting of prices will be successful only if not counteracted by competitors. A producer with *de minimis* market power will have no ability to influence competitive entry decisions through price reporting. By contrast, producers in an oligopoly marketplace may tacitly collude in false price reporting, and a monopoly producer will be able to control price reports through its unilateral conduct.

Harm to consumers can occur where prices are pegged to a benchmark and the manipulation serves to impact that benchmark in the seller's favour.⁷² But because the rule operates in the wholesale marketplace, some form of pass-through would be required to produce an effect on individual end-user consumers.

4. Monopoly Exploitation

The US system has traditionally viewed abuse of properly acquired monopoly power as not presenting a competition law concern,⁷³ although it may implicate

between conduct in bilateral negotiations, which are "unlikely to affect the integrity of the market", and "widely disseminated" false statements or omissions, which have market-wide consequences. The former are not intended to be covered by the prohibition on manipulation, while the latter are. See *ibid*, 3, 10.

⁶⁹ See OFT, *supra* n 2, para 2.3 (differentiating "individual retail consumers" from "large players, both upstream and downstream").

⁷⁰ Cf *Illinois Brick Co v Illinois*, 431 US 720 (1977) (indirect purchasers not entitled to sue under US antitrust laws).

⁷¹ Cf E Romstad, "The Informational Role of Prices" (2008) 35 *European Review of Agricultural Economics* 263. Antitrust caselaw recognises the role of prices in inducing competitive entry. See, eg *Kiefer-Stewart Co v Joseph E Seagram & Sons*, 340 US 211 (1951) (holding horizontal maximum price fixing to be per se illegal; holding has been supported because the maximum price fixing has the capacity to preclude competitive entry).

⁷² See *In re CMS Mktg Servs & Trading Co*, Comm Fut L Rep (CCH) ¶ 29,634 (CFTC, 25 November 2003) (the Commodity Futures Trading Commission, acting under its own market manipulation rule, finding liability for the submission of false information to private reporting services).

⁷³ Although the dominant theoretical basis for antitrust enforcement in the US does not cognise exploitation as grounds for a remedy, there are historical examples of similar theories succeeding. See, eg *United States v Socony-Vacuum Oil Co*, 310 US 150 (1940) (manipulating prices in gasoline markets by buying up distress inventory at the "fair going market price" held per se illegal).

consumer protection issues if it violates a particular prohibition.⁷⁴ For example, some US states prohibit “price gouging”, defined (under one representative law) as selling or leasing essential commodities or shelter at an excessive mark-up over the average price prior to the emergency.⁷⁵ The US approach is shared by the Canadian Competition Bureau. In the January 2009 Draft Abuse of Dominance Updates, the Competition Bureau notes that abuse of dominance is a concern where the abuse “has had, is having, or is likely to have the effect of substantially preventing or lessening competition . . . [H]igh prices do not in themselves raise issues under the Act”.⁷⁶

Charging excessively high prices is the most obvious example of such a monopoly abuse. Standard microeconomic theory proposes that charging high prices is what incentivises new entry, so is likely to bring about the downfall of the monopolists’ position.⁷⁷

The EC has announced that such “directly exploitative” conduct may infringe Article 82, prompting Commission intervention “in particular where the protection of consumers and the proper functioning of the internal market cannot otherwise be adequately assured”.⁷⁸ Examples exist of prosecutions for monopoly exploitation in the EU.⁷⁹

The proper role of exploitative abuse enforcement in a competition law scheme is unclear. Correcting for abuses permitted by asymmetries in bargaining power favouring producers is a natural extension of contract law “overreaching” doctrines, such as duress and unconscionability, and as such may be properly the subject of a consumer protection framework. However, such abuses can be invitations to competitive entry. Correcting for those abuses may entrench the power of a monopolist, rather than increase competition.⁸⁰ And Commissioner Kovacic has suggested that “controls on abusive behavior by dominant enterprises’ may “inevitably become mechanisms by which frail and politically

⁷⁴ See H Hovenkamp, *The Antitrust Enterprise* (Harvard University Press, 2005), 108–09 (“Firms . . . determine their own output and set prices . . . None of this behavior is even presumptively suspicious”).

⁷⁵ See, eg Florida Statutes 501.160.

⁷⁶ Draft Updates, *supra* n 32, i (Executive Summary). See also M Aitken, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 38.

⁷⁷ See FH Easterbrook, “Monopoly, Manipulation and the Regulation of Futures Markets” (1986) 59 *Journal of Business* S103, S105.

⁷⁸ Communication from the Commission, *supra* n 31, 5. An example of this might be found in the investigation of a supplier in the German electricity market. See European Commission, “Report on Competition Policy 2008” (23 July 2009), paras 49–50. E.ON AG was thought to have “abused its dominant market position . . . by strategically withholding production capacity of certain power plants on the wholesale market in order to drive up the price”.

⁷⁹ See, eg Case C-323/93 *Société Civile Agricole du Centre d’Insemination de la Crespelle v Cooperative d’Elevage et d’Insemination Artificielle du Département de la Mayenne* [1994] ECR I-5077, I-5106.

⁸⁰ It is all the more a concern that the monopolist whose power is entrenched has proved itself to be an unlikable character.

buffeted competition agencies reestablish the type of state orchestration of the economy that market reforms were designed to eliminate”.⁸¹

D. ENFORCEMENT SYSTEMS

The systemic question is whether an agency constituted to advance competition policy can also serve the purpose of protecting individual consumers. It is possible consumer protection enforcement is best placed in the hands of private litigants. It is logical to question whether public enforcement of consumer protection laws, or consumer-protection-like behavioural exploitation, market manipulation or monopoly exploitation claims under a competition framework fails the test of comparative advantage. Such enforcement may rely on the particulars of individual consumers’ circumstances in a way that favours private enforcement over public. By contrast, some have questioned the capacity of private litigants to remedy harms felt across the marketplace, rather than in individual transactions.

1. Agency Structure

A plurality of national competition agencies are combined with their consumer protection watchdogs.⁸² In the US, the Federal Trade Commission⁸³ and many state enforcement agencies are so structured. The Canadian Competition Bureau and Competition Tribunal combine competition law and consumer protection enforcement mandates.⁸⁴ That is the chosen structure for the UK Office of Fair Trading⁸⁵ and, as of recently, the Irish Competition Authority.⁸⁶ DG Competition has created a “dedicated Consumer Liaison unit”.⁸⁷ According to the OFT, “[f]rom a recent ‘back of the envelope’ check on 37 other countries, we see that about one third of them also have agencies in which competition and consumer functions are combined”.⁸⁸ If enforcement systems compete just as to

⁸¹ Kovacic, *supra* n 1, 103. *Cf* the remarks of Bill Prasifka at the Fourth Antitrust Marathon (27 October 2009), *infra* p 38 (noting concerns for regulatory capture in consumer protection enforcement).

⁸² See Federal Trade Commission, “Competition and Consumer Protection Authorities Worldwide”, available at <http://www.ftc.gov/oia/authorities.shtml> (accessed on 2 February 2010).

⁸³ See TJ Muris, “More than Enforcement: The FTC’s Many Tools—A Conversation with Tim Muris and Bob Pitofsky” (2005) 72 *Antitrust Law Journal* 773, 780–81 (former chairman Robert Pitofsky noting that the FTC’s twin enforcement regimes share the overriding mission of improving consumer welfare.)

⁸⁴ <http://competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/home> (accessed on 2 February 2010).

⁸⁵ <http://www.offt.gov.uk/> (accessed on 2 February 2010).

⁸⁶ See P Gorecki, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 34.

⁸⁷ EC, *supra* n 30, para 109, 27. See http://ec.europa.eu/competition/consumers/liaison_en.html (accessed on 2 February 2010).

⁸⁸ OFT, *supra* n 2, para 4.1 (citing specifically the US, Canada and Australia).

participants in the commercial marketplace, the success of the dual-responsibility agency seems apparent.

It is harder to explain why an agency with a divided mission should be preferable to one with a single purpose.⁸⁹ Commissioner Kovacic has written: “The Commission’s capacity to meld expertise in economics, competition, and consumer protection is a conscious element of its institutional design and a major reason for its existence”.⁹⁰ Efficiencies do clearly exist in consolidated management, and the Bureau of Economics serves the enforcement efforts of both legal bureaus. And the market manipulation rule (Section C.3, *supra*) appears to provide an example of cooperative efforts between the competition lawyers and consumer protection lawyers at the agency.⁹¹ The Canadian experience with efficiencies and occasional coordinated enforcement efforts is similar.⁹²

On the other hand, anecdotal hearsay evidence suggests that at the Federal Trade Commission, the Bureaus of Competition and Consumer Protection rarely coordinate enforcement efforts.⁹³ Commissioner Aitken recognised the tensions and managerial challenges inherent in the realities of easy wins in small cases for consumer protection contrasted with the esoteric theories and difficult litigation in larger cases for competition law.⁹⁴

The OFT recognises the limited gains from ostensible integration.⁹⁵ “Until recently[, its] competition and consumer enforcement work sat within two separate divisions—in effect two silos with their own legal and intellectual worlds which had little to do with each other.”⁹⁶ But the OFT is optimistic about the possibilities for further integration going forward.⁹⁷

⁸⁹ Perhaps supporting this assertion, Paul Gorecki noted in comments at the Fourth Antitrust Marathon that Ireland chose an administrative structure which separated competition enforcement from consumer protection, but later combined them in a “shotgun marriage”, with “no study”, and “mainly for budgetary reasons” (*infra* pp 33–34).

⁹⁰ Kovacic, *supra* n 4, v (Introduction).

⁹¹ See “Report of the Federal Trade Commission on Activities in the Oil and Natural Gas Industries” (January–June 2009), 3, available at http://www.ftc.gov/ftc/oilgas/competn_reports.htm (accessed on 29 December 2009).

⁹² See M Aitken, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* pp 31, 32 (noting “efficiencies in management” and a “relatively rare occasion” of “collaborative work across the two missions”).

⁹³ This appears to reflect the reality (if not the aspiration) for other agencies as well. In Canada, “it is probably undeniable that the actual shared work, this notion that you would integrate the perspectives into a particular case comes up from time to time but not very often”. M Aitken, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 32.

⁹⁴ M Aitken, remarks at the Fourth Antitrust Marathon (27 October 2009), Tr 18–19 (noting the populist effect of consumer protection but the lack of a “big bang” for each enforcement dollar “leaving aside the media”).

⁹⁵ OFT, *supra* n 2, ¶ 4.2.

⁹⁶ OFT, *supra* n 2, ¶ 4.2.

⁹⁷ See C Elithorn, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 28 (“I certainly feel the OFT does have a single purpose; its mission is to make markets work well for consumers so I wouldn’t recognise that divide in a way that I think sometimes the debate tries to force upon the OFT”).

Similar to the FTC bureaus' combined efforts in market manipulation, producing a rule that is susceptible to characterisation as both competition law and consumer protection (see Section C.3, *supra*), OFT recognises that “[w]hat begins as a competition issue may turn out to be more susceptible to consumer remedies, and vice versa”.⁹⁸ Commissioner Aitken noted a particular example of a merger review in which “[w]e had our fair business folks, our consumer protection folks looking at it, our abuse of dominance folks looking at the conduct as well and then of course our merger folks looking at the merger”. That was, in her view, an example of a successful coordinated cross-agency effort.⁹⁹ None of the commenters at the Fourth Antitrust Marathon nor the OFT in its December 2009 White Paper on integration explained what result would obtain where an irreconcilable tension arose between enforcers focused on competition policy and those focused on consumer protection.¹⁰⁰

As one example of its integrated enforcement efforts, the OFT describes a process of market studies in recent years and currently, studying both supply-side and demand-side characteristics of a particular industry. Maurice Stucke recently has proposed just such an approach to innovative enforcement for the US system.¹⁰¹ It is possible intra-agency cooperation is more realistic at the level of market-wide regulatory efforts, like those described by the OFT in its White Paper or recommended by Stucke, in contrast with casework in a specific investigation. An exception might be made for merger investigations like that described by Commissioner Aitken, which, with the structural remedies at issue, is more akin to a market-wide regulatory effort than to a more discrete conduct investigation.

2. Private Enforcement

Systems analysis must also consider the role of private enforcement. Private enforcement has been a hallmark of the US system of competition law enforcement since its inception, with the powerful incentives to private suit offered by the treble damages remedy and class action device.¹⁰² Private remedies have been available in Canada since 1976.¹⁰³ The European Commission

⁹⁸ OFT, *supra* n 2, para 4.9.

⁹⁹ M Aitken, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* pp 32–33.

¹⁰⁰ For example, Paul Gorecki noted a specific example in Ireland in the wine industry, in which price freezes were opposed by competition authorities but supported by consumer protection enforcers. P Gorecki, remarks at the Fourth Antitrust Marathon (27 October 2009), *infra* p 34.

¹⁰¹ See ME Stucke, “New Antitrust Realism” [January 2009] *Global Competition Policy* 4, available at papers.ssrn.com/abstract_id=1323815.

¹⁰² See M Huffman, “A Standing Framework for Private Extraterritorial Antitrust Enforcement” (2007) 60 *SMU Law Review* 103, 103–04.

¹⁰³ Competition Act § 36 (permitting private claims for harm suffered (not including punitive damages) with a two-year statute of limitations). See RP McAfee, HM Mialon and S Mialon, “Private versus Public Antitrust Enforcement: A Strategic Analysis” (2008) 92 *Journal of Public Economics* 1863.

recently clarified the standards under which private damages actions are permissible for breaches of Articles 81 and 82.¹⁰⁴ No system worldwide has relied as heavily on private enforcement as has the US.¹⁰⁵

There are difficult questions whether private competition law enforcement is consistent with the efficiency goals of competition law. Private litigants may be wrongly incentivised to pursue the efficiency goals of competition law.¹⁰⁶ Public agencies charged with remedying market-wide competitive harms are less likely to engage in strategic litigation favouring individual results over social welfare.¹⁰⁷

But in general, the past decade has seen an increase in the availability of private damages actions worldwide.¹⁰⁸ Meanwhile, since 1977 decisions by federal courts in the US have severely curtailed the availability of private damages actions in competition law, imposing stringent standing limitations,¹⁰⁹ pleading requirements¹¹⁰ and direct-purchase requirements,¹¹¹ as well as limiting the substantive causes of action.¹¹²

In contrast with competition law, where debates rage as to the propriety of a private action,¹¹³ private enforcement of consumer protection laws seems entirely appropriate. In the US system many consumer protection statutes provide specific incentives in the form of statutory minimum damages and attorney fees

¹⁰⁴ See European Commission, *supra* n 31, paras 15–17, 5–6. The Commission has “suggest[ed]” representative actions by consumer associations or trade associations and “opt-in collective actions” as possible complements to the damages remedy.

¹⁰⁵ See DA Crane, *supra* n 16, draft, 2.

¹⁰⁶ See *ibid*, draft, 2–3, 7–8 (“private parties who sue antitrust defendants typically will not be suing to vindicate the interests of the consumers who stopped buying the goods because they were too expensive but only for the purchasers who did buy and incurred an overcharge”).

¹⁰⁷ See W Page, remarks at the FTC Workshop on Section 5 of the FTC Act as a Competition Statute (17 October 2008), Tr 99 (attributing to this author the belief that “the FTC is in a different position from the private plaintiff run amuck”, who might be analogised “to the herders in the tragedy of the commons story, who damage the public interest by their single-minded pursuit of private gain”). Cf WE Kovacic, Dissenting Statement, Crude Oil Price Manipulation Rulemaking (2009), 2 and n 10 (noting an increased concern for excessive enforcement of the FTC’s petroleum market manipulation rule if private enforcement occurs under state “Baby FTC” Acts interpreted coextensively with the FTC Act), available at http://www.ftc.gov/os/2009/08/P082900mmr_kovacic.

¹⁰⁸ Crane, *supra* n 16, draft, 2.

¹⁰⁹ See *Brunswick Corp v Pueblo Bowl-o-Mat*, 429 US 477 (1977).

¹¹⁰ See *Twombly*, *supra* n 29. *Twombly* is not limited to private claims, but applies equally to public enforcement. For a variety of reasons, however, the pleading requirements imposed by *Twombly* affect private plaintiffs uniquely. See M Huffman, *supra* n 27.

¹¹¹ See *Illinois Brick*, *supra* n 69. By contrast, indirect purchaser suits are expressly permitted in the EU. See European Commission, White Paper on Damages actions for breach of the EC antitrust rules § 2.1, 4 (2 April 2008).

¹¹² For one of many examples, see *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209 (1993) (predatory pricing claims).

¹¹³ See, eg McAfee *et al*, *supra* n 103, 1–2 (noting strategic misuses of antitrust laws in cases such as *Utah Pie Co v Continental Baking*, 386 US 85 (1967)). Consumer enforcement presents the differing problems of possible abusive class litigation and incentives improperly aligned with the purposes of antitrust enforcement. See Huffman, *supra* n 102, 114; Huffman, *supra* n 27.

for successful plaintiffs.¹¹⁴ Private consumer protection enforcement rarely involves concerns for strategic litigation by competitors.¹¹⁵ The harm sought to be remedied by the legal scheme is the harm in the individual transaction, so there is a perfect alignment of interests between the consumer plaintiff and the legal scheme. Although anti-regulation zealots might contend market forces obviate the need for consumer protection regulation entirely, where it exists it is difficult to cavil with imposing a private right of action and remedy.

E. CONCLUSION

This issue paper discusses the question whether and how the integration of competition law and consumer protection can be accomplished. The differing understandings of consumer harm, and the remedy for that harm, between the disciplines presents ostensible tension. But there is room for common enforcement theories. Only where consumer protection serves to remove consumer choice, by targeting substantive transaction terms, are the disciplines actually irreconcilable.

Systems of enforcement also may differ between the fields. Private enforcement is a more natural fit for consumer protection than for competition law because of the focus consumer protection places on individual consumer transactions. Circumstances will exist in which competition law is better left to government enforcers. Within agencies, combining consumer protection and competition law has obvious efficiency benefits, but the extent of benefit in the products of the agencies' work is less clear.

¹¹⁴See, eg Truth in Lending Act, 15 USC § 1640(a) (statutory damages plus attorney fees).

¹¹⁵Consider, however, the circumstance of intellectual property protection, a form of consumer protection regulation traditionally enforced by competitors rather than consumers.